82-1902

IN THE

Supreme Court of the United States

October Term, 1982

No.

BERNARD J. DOLENZ, M.D.

Petitioner,

vs.

ALL SAINTS EPISCOPAL HOSPITAL

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Bernard J. Dolenz, M.D.
6102 Swiss Avenue
Dallas, Texas 75214

Pro Se

To the Justices of the Supreme Court of the United States:

Bernard J. Dolenz, M.D., the petitioner herein, prays that a Writ of Certiorari issue to review the decision of The Supreme Court of Texas denying review of the judgment and opinion of the Texas Appeals Court in Fort Worth. Alternatively, if the Court deems it more appropriate that the Writ be directed instead to the Texas Appellate Court, it is requested that this petition be so read.

OPINIONS BELOW

The trial court withdrew this case from the jury at the close of Plaintiff's evidence and granted Defendant Hospital's Motion for Directed Verdict August 24, 1981. This was affirmed at the Appeals level July 1, 1982. A motion for rehearing was overruled September 9, 1982. The Texas Supreme Court refused an application for Writ of Error December 31, 1982 and overruled the Motion for Rehearing February 9, 1983.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 USC Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether the Texas Supreme Court and Appeals Court erred in failing to identify and consider substantial questions of due process and equal protection under the Fourteenth Amendment by not requiring non profit private hospitals to follow their own medical staff bylaws adopted by the medical staff and approved by the governing board.

2. Whether or not the Texas Nonprofit Corporation Act, which regulates nonprofit corporations in Texas and requires them to adhere to their own adopted rules should apply to private non profit hospitals and provide Fourteenth Amendment due process and equal protection.

STATUTE INVOLVED

This case involves interpretation of Article 1396 - 1.02(5) Tex.Rev.Civ.Stat. (Vernon 1980): "'Bylaws' means the code or codes of rules adopted for the regulation or management of the corporation, irrespective of the name or names by which such rules are designated" and the Fourteenth Amendment to the Constitution of the United States: "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Plaintiff psychiatrist was involuntarily removed from the staff of All Saints Episcopal Hospital after being a staff member in good standing for 13 years, primarily because of a personality clash with the head psychiatric nurse over the Christian thrust he was giving his patients in conjunction with an Episcopal priest. A faction arose and conspired to oust Plaintiff and used "inadequacy" of records as the reason; however, the hospital refused to allow the records to be reviewed by an impartial party such as an outside independent medical records librarian, by respected peers of the American Psychiatric Association, by the Joint Commission, or even by its own staff psychiatrists. During depositions, the Administrator of the hospital ADMITTED that the medical records

"inadequacy" was merely a ploy to oust this psychiatrist. Various procedures of due process in the hospital bylaws were denied Plaintiff. Defendant hospital admitted on Request for Admissions: "Defendant did not follow its Bylaws in terminating Plaintiff from its medical staff, from his medical staff privileges." Plaintiff sued Defendant hospital to be reinstated on the staff after wrongful termination of his position due to a deprivation of his Constitutionally protected right to due process of law and a conspiracy among certain members of Defendant's staff, its agents and employees, and additionally sought damages for breach of contract and defamation. The lack of due process was brought out at all trial levels, but the Texas courts hold that Weary and this case suggest that private hospitals are not required to follow their own medical staff bylaws adopted by the medical staff and approved by the governing board.

REASONS FOR GRANTING WRIT

1.

Certiorari Should Be Granted to Resolve Conflicts in Principle Among the Lower Courts that give rise to substantial Constitutional questions and equal protection under the Fourteenth Amendment.

The private hospital oriented physician can be easily handcuffed from having hospital staff privileges. He has essentially no recourse in the Texas courts in a private non profit hospital, even though such hospitals may have funding from Federal sources such as Hill-Burton funds and Medicare.

Notwithstanding the importance[1] to physicians, hospitals, and the public of grants of medical staff privileges, procedures for staff

selection are often capricious and arbitrary.[2] Although staff privileges are officially granted by the hospital's board, the actual decisions concerning staff selection are generally made by members of the hospital's current medical staff.[3] These medical staffs often function like "exclusive social clubs or secret fraternal societies,"[4] having power to exclude an applicant for "ideological, moral or even political reasons,"[5] or for no reason at all.[6] Furthermore, the denial of privileges at one hospital may have adverse or even disastrous consequences for the physician's career in general.[7] Widespread abuse in the staff selection process has been alleged or documented in numerous cases and may involve conspiracy to exclude new competition for patients,[8] race discrimination,[9] bias against osteopathic doctors,[10] intolerance of a doctor's criticism of hospital policy,[11] irrationally restrictive bylaws,[12] mistaken summary appraisal of a doctor based on uncorroborated hearsay and rumor,[11] and conspiracy to exclude a physician who testifies extensively in malpractice litigation.[12]

Considering the abuses and importance of properly granting staff privileges, there should be some means of correcting improper denials of staff privileges. If the hospital is a public institution, owned and operated by government entities, a physician denied staff privileges may contest the denial in court and assert his right to the due process and equal protection safeguards of the United States Constitution and to certain federal statutory safeguards.[13]

Most hospitals are private non-profit corporations; some private hospitals are operated for profit. The question whether the denial of staff privileges by a private hospital is judicially

reviewable has been approached differently by the courts. In general the approaches provide the same kind of protection for the physician: procedural and substantive safeguards to insure a fair hearing on his qualifications. Many jurisdictions, when confronted with a private hospital's unreasonable denial of staff privileges, have imposed a common law FIDUCIARY duty upon the hospital.[14] Under this duty, the hospital must insure that privileges are not denied unreasonably, arbitrarily, or capriciously. In a leading case, Greisman v. Newcomb Hospital,[10] the New Jersey Supreme Court held that the defendant private, non profit hospital had a fiduciary duty to evaluate the plaintiff physician's application for staff privileges on its merits, rather than arbitrarily excluding all osteopathic doctors under a provision of the hospital's bylaws. In finding a fiduciary duty, the court relied upon its determination that the hospital was not strictly private because it had received substantial funds from public sources and through public solicitations, had received tax benefits, possessed a virtual monopoly on area health care facilities, and was a non profit organization dedicated by virtue of its certificate of incorporation to serving the sick and injured. The court further noted that enterprises even more private in nature than hospitals had been subjected to state regulation. The court also observed that courts had imposed a common law duty on innkeepers, carriers, and farriers to serve all "comers". Finally, the court noted that it had the power to expand the common law to serve current public needs and cited its own recent decision vesting a local medical society with a fiduciary duty respecting membership applications. Therefore, the court concluded that it was justified in imposing a similar duty on the defendant hospital.

Such is not the case in Texas. Weary v. Baylor University Hospital[15] controls staff privileges:

> There is no question but that the various committees of the Medical Staff including the Medical Board could only recommend and advise on reappointments; and the Governing Board has final authority on reappointments and is under no obligation to accept or reject the recommendations of the Medical Board. The governing board has the power to determine who shall practice in the hospital, and such power to make staff appointments and reappointments is without restriction. Neither the results of a hearing, nor the provisions for a hearing before the Medical Board are binding on the Governing Board; and internal procedures set forth in the Medical Staff Bylaws, even though such Bylaws be approved and adopted by the Governing Board, cannot limit the power of the Governing Board of the hospital to reappointing or not reappointing a staff doctor. (Emphasis added.)

Dallas Neurosurgeon Weary had a personality clash with someone on the staff. The hospital would not reappoint him to the staff, and the Weary court held that this was proper without a hearing.

While at first blush it would appear that after an appointment to the staff had been made,

the hospital would then be obligated by law to follow its bylaws, rules and regulations. Such is not the case in Texas, as the All Saints court suggests that Weary applies to members who were currently on the staff as well, and that the Governing Body has unbridled authority to oust a staff member without following its own bylaws.

While Weary stands and has been expanded to current staff members in Texas, other courts[16] impose limitations on such unfettered power.

In an interesting suit between St. John's Hospital Medical Staff and its hospital,[16] the Supreme Court of South Dakota (1976) held that where the medical staff bylaws were adopted and approved by both the hospital and the medical staff, a contractual relationship existed, subject only to amendment upon agreement by both the hospital staff and the hospital. The hospital tried to unilaterally modify the bylaws, which bylaws unilaterally adopted by the hospital were held to be null and void.

In O'Brien,[16] the Maryland Special Appeals Court (1981) held that hospital bylaws have force and effect of an enforceable contract.

The requirement of due process of law, as guaranteed by the Fourteenth Amendment, embraces those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[17]

Due process must be determined "by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeds

appropriate to the nature of the case." Anderson National Bank v. Luckett, 321 U.S. 233, 246 (1944) The fundamental requirement of due process is an opportunity to be heard upon such notice and at such proceedings as are adequate to safeguard the right for which protection is invoked. Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230 (1900). Procedural due process rights attach where state action condemns a person to "suffer grievous loss of any kind." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951).

In Shelley v. Kraemer, 334 U.S. 1, 17 and 18, 92 L.Ed. 1161, 68 S. Ct. 836 (1948) the Court noted that the Fourteenth Amendment protections extend to the action of state courts as well as to other state infringements.

2.

Certiorari Should be Granted as the Texas courts have decided an important issue in a way in conflict with applicable state law.

It is unfortunate that the Weary and All Saints cases suggest that private hospitals are not required to follow their own medical staff bylaws adopted by the medical staff and approved by the governing body. This is specially true in light of the Texas Nonprofit Corporation Act, which regulates non-profit corporations in Texas and requires them to adhere to their own adopted rules. (Article 1396 - 1.02).

3.

Certiorari Should be Granted as Public Policy Demands It.

St. John's Hospital Medical Staff, O'Brien, and others seem to be the better view as such unfettered power by the hospital's governing boards in Texas should be against public policy. In Texas a physician can be kept excluded from a staff because he is unliked, because he has given testimony against a local physician, because he wears the wrong tie, or for any reason, and it does not have to be given!

In all malpractice cases a physician must serve as an expert witness to establish the standard of medical practice against which the medical defendant will be judged. What physician will given expert testimony if he knows he can be passed over when it comes to appointment time, or just kicked off the staff at any time, at any private non profit hospital without any procedural or "due process" protection? Do you need any better reason for the "conspiracy of silence"?

4.

Certiorari Should Be Granted as the Doctors Desperately Need Judiciary Help

Chief Justice Burger in the Annual Report of the State of the Judiciary (ABA Journal, April 1983) who analogizes the Court's burden and "crying wolf":

> But I suggest the analogy of the early pioneer who, looking out the window of his log cabin, saw a pack of wolves destroying his livestock, killing his chickens, and clawing at his smokehouse with its supply of food. Someone in that situation need not be apologetic about calling

> for help--if there is anyone within hearing who can help--as you who are within hearing can help.

The doctors need someone to hear them too, and the doctors hope that this Court is within hearing, as a doctor without a hospital is like a lawyer without a courthouse. The doctor's prayer regarding the hospital and judiciary is similar to that of Habakkuk (The Living Bible at 715):

> O Lord, how long must I call for help before you will listen? I shout to you in vain; there is no answer. 'Help! Murder!' I cry, but no one comes to save. Must I forever see this sin and sadness all around me?
>
> Wherever I look there is oppression and bribery and men who love to argue and to fight. The law is not enforced and there is no justice given in the courts, for the wicked far outnumber the righteous, and bribes and trickery prevail.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Bernard J. Dolenz, M.D.
6102 Swiss Avenue
Dallas, Texas 75214

PRO SE

FOOTNOTES

1. Health Law Center, Problems in Hospital Law (2 ed. 1974).

2. Barrett v. United Hosp. 376 F. Supp. 791, 803 (S.D.N.Y. 1974).

3. Joining the Hospital's Professional Social Club. Action Action Kit for Hospital Law. November 1973 at 3.

4. Id.

5. Id.

6. Hawkins v. Kinsie, 540 P. 2d 345, 348 (Colo. App. 1975).

7. Christhilf v. Annapolis Emergency Hosp. Assn., 496 F.2d 174 (4th Cir. 1974).

8. Willis v. Santa Ana Comm. Hosp. Ass'n, 58 Cal. 2d 806, 376 P. 2d 568, 26 Cal Rptr. 640 (1962); Burkhart v. Comm. Med. Center, 432 S.W. 2d 433 (Ky 1968); Cowan v. Gibson, 392 S.W. 2d 307 (Mo. 1965); Nashville Mem. Hosp. Inc. v. Brinkley, 534 S.W. 2d 318 (Tenn. 1976).

9. Foster v. Mobile County Hosp. Bd., 398 F. 2d 227 (5th Cir. 1968); Meredith v. Allen County War Memorial Hosp. Comm'n, 397 F. 2d 33 (6th Cir. 1968); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F 2d 648 (4th Cir. 1967); Eaton v. Grubbs, 329 F. 2d 710 (4th Cir. 1964); Siminks v. Moses H. Cone Memorial Hosp., 323 F. 2d 959 (4th Cir. 1963), cert. denied 376 U.S. 938 (1964).

10. Greisman v. Newcomb Hosp., 40 N.Y. 389, 192 A. 2d 817 (1963); Schneir v. Englewood Hosp. Ass'n, 91 N.J. Super. 527, 221 A 2d 559 (1966). Health Law Center, supra at 199.

11. Ascherman v. San Francisco Med. Soc., 39 Cal. App. 3d 623, 114 Cal. Reptr. 681 (1974).

12. Brinker v. Crane, 468 F. 2d 1228 (1st. Cir. 1972).

13. Kline v. Lutheran Charities Ass'n, 523 F. 2d 56 (8th Cir 1975); Schooler v. Navarro County Mem. Hosp., 375 F. Suppl 841 (N.D. Tex. 1973; Schuman v. Washington Hosp. Center, 222 F. Supp. 59 (D.D.C. 1963). Annot. 37 A.L.R. 3d 645, 666-669 (1971).

14. Peterson v. Tuscon Gen. Hosp., Inc., 114 Ariz. 66, 559 P. 2d 186 (Ariz. App. 1976); Anton v. San Antonio Comm. Hosp. 55 Cal. App. 3d 212, 127 Cal. Rptr. 394 (1976); Hawkins v Kinsie, 520 P. 2d 345 (Col. App. 1975); Silver v. Castle Memorial Hosp., 53 Hawaii 475, 497 P. 2d 567 (1972), cert. denied, 409 U.S. 1048 (1972).

15. Weary v. Baylor Univ. Hosp., 360 SW 2d 895 (CCA Waco 1962) writ ref.

16. St. John's Hospital Medical Staff v. St. John's Regional Medical Center, Inc., 245 N.W. 2d 472 (So. Dak. 1976). Berberian v. Lancaster Osteopathic Hospital, 149 A 2d 456 (Pa); Joseph v. Passaic Hosp. Ass'n, 141 A 2d 18 (New Jersey); and Anne Arundel Gen. Hosp., Inc. v. O'Brien, 423 A. 2d 483 (Maryland 1980).

17. Powell v. Alabama, 287 U.S. 45 (1932).

APPENDIX "A"

NO. 48-44953-77

BERNARD J. DOLENZ, M.D.	IN THE DISTRICT COURT
VS.	TARRANT COUNTY, TEXAS
ALL SAINTS EPISCOPAL HOSPITAL	48th JUDICIAL DISTRICT

JUDGMENT

That portion of the above styled and numbered cause not disposed of by this Court's Partial Summary Judgment signed on May 2, 1978, wherein Bernard J. Dolenz is Plaintiff and All Saints Episcopal Hospital is Defendant was duly and regularly set for trial and came on for hearing on August 10, 1981, and all parties announced ready for trial. A jury having been demanded in this case, such jury consisting of twelve good and qualified jurors was duly empaneled, sworn, and the case proceeded to trial.

On August 11, 1981, at the conclusion of the Plaintiff's evidence, the Plaintiff rested and the Defendant moved that the case be withdrawn from the jury and that it be given judgment as a matter of law. The Court, being of the opinion that the Defendant was entitled to judgment as a matter of law, withdrew the case from the jury and, considering its Partial Summary Judgment previously entered, enters judgment as follows:

It is, therefore, ORDERED, ADJUDGED AND DECREED that Plaintiff, BERNARD J. DOLENZ, take nothing against Defendant, ALL SAINTS EPISCOPAL HOSPITAL, and that said Defendant stands fully and finally released and discharged from all liability to Plaintiff on account of all matters and

things asserted in this case. It is further ORDERED that all costs of court incurred herein, be, and they are hereby, taxed against the Plaintiff for which the Clerk may have his execution.

SIGNED this the 24th day of August, 1981.

(s) Walter E. Jordan
JUDGE PRESIDING

APPENDIX "B"

COURT OF APPEALS
Second Supreme Judicial District

Fort Worth, Texas, July 1, 1982.

Mr. Mack Ed Swindle 335 4417
Owen, Michener, Swindle, Whitaker & Pratt
1700 Continental Nat'l. Bank Bldg.
Fort Worth, Texas 76102

Dear Sir:

The Juddment of the Trial Court in case of

Bernard J. Dolenz, M.D. vs.
All Saints Episcopal Hospital No. 2-81-044-CV
from Tarrant County, was affirmed
today. Copies of the opinion and judgment of the Court are hereto attached.

Yours truly,
Yvonne Palmer, Clerk

YP/mft

APPENDIX "C"

No. 2-81-044-CV
IN THE COURT OF APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

BERNARD J. DOLENZ, MD. APPELLANT

VS.

ALL SAINTS EPISCOPAL HOSPITAL APPELLEE

FROM THE DISTRICT COURT OF TARRANT COUNTY

OPINION

Bernard J. Dolenz, as plaintiff, brought suit against All Saints Episcopal Hospital prior to March 14, 1978. On that date Dolenz filed his First Amended Petition in which he sought mandatory injunctive relief by a writ "restraining All Saints staff, servants, agents and employees from rescinding Plaintiff's staff privileges, until a final hearing; (2) That on final hearing thereof Defendant All Saints whose agents, servants and employees be permanently enjoined...". He also sought $100,000.00 for "slanderous and untrue remarks made by agents of All Saints Hospital that have been communicated...".

Following a March 31, 1978 hearing on All Saint's motion for partial summary judgment to deny Dolenz injunctive relief, a partial summary judgment was rendered and entered in denial of the Dolenz claim therefor on May 2, 1978.

Subsequently Dolenz' pleadings were twice amended. Afterward trial was held on his cause of action for damages for slander, beginning August 10th, 1981. This trial was on Dolenz' Third Amended Original petition. In that amended pleading Dolenz neither alleged circumstances by which he might have founded a claim for injunctive relief nor did he pray for such form of relief. A result is that on August 10th, 1981 Dolenz is to be treated as having abandoned his prior suit for injunction.

At the conclusion of Dolenz' case in chief, defendant All Saints moved for instructed verdict or withdrawal of the case from the jury and for rendition of a take nothing judgment. The court granted the motion and rendered such a judgment on August 24, 1981. By recitations of the judgment it was held that the evidence tendered presented no case for slander against All Saints; and, if the evidence did prove slanderous statements chargeable against said defendant, that there was no slander which was slanderous per se; and that there was no proof of damages. The take nothing judgment also recited the fact of the rendition and entry of the earlier partial judgment. Therefrom Dolenz appealed.

We affirm the judgments by the trial court. This we do because we hold Dolenz abandoned his claim for injunctive relief, and because there was no evidence which required submission of any special inquiring as to existence of any defamation or any conspiracy to defame plaintiff Dolenz as charged in the amended pleading on which he announced ready for trial.

On Dolenz' abandonment of his claim for injunctive relief the law is correctly stated in McDonald, Texas Civil Practice, Revised, in Chapter VIII, "Supplemental & Amended Pleadings", sec.

8.01.3, "(Definitions and Distinctions) - B. Function of Amended Pleading", and sec. 8.10., "(Amended Pleadings. A. Right to Amend) - E. Status of Superseded Pleadings and of Replies Thereto". In a situation such as presented an amended pleading supplants the instrument amended and that which it amends is no longer proper to be considered part of the trial record. We hold that prior to time of the trial begun August 10th, 1981, by operation of law, Dolenz had abandoned his suit for injunctive relief, permanent as well as temporary, and his cause of action did not then embrance any claim therfor. In Dolenz' appeal from the judgment of August 24, 1981 he could not complain of the adjudication upon his original plea for injunction because his cause of action therefor had been abandoned when he went to trial on his Third Amended Original Petition.

Dolenz' appeal as applied to his charge of conspiracy and slander by All Saints is concluded to be without merit because it did not present any reversible error by the judgment that he take nothig. As a corporation, All Saints could not be guilty save by acts for it through agents. No slander, nor conspiracy to accomplish slander, was proved as applied to any employee or agent - acting within the scope and course of his capacity as agent or in furtherance of the interests of All Saints as his principal. Neither were any statements Dolenz deemed slanderous as made by All Saint's employees and agents referable to or in discharge of any duty owed to All Sants as principal. Further, even should we attribute the remarks charged to amount to an accomplished slander (by any employee or agent, acting within his capacity as such, with the same heard only by another employee or agent of All Saints acting in like capacity) the remarks proved as made and heard could only have operated to prove that All Saints

had conspired with itself. This would not amount to evidence of conspiracy. This was the nature of the evidence upon which Dolenz relies.

Finally, we hold the nature of the remarks charged to be slanderous, even should they be treated as amounting to a slander, would not qualify to be slander per se, or within themselves, so that injury to Dolenz would be presumed to have resulted. By the remarks was no defamation of Dolenz' character by imputation of crime or, as applied to the situation in this case, calculated to affect him injuriously in his medial practice. Continuing in our treatment of the remarks as amounting to slander, they could have amounted to no more than slander per quod, i.e. words communicated to third persons which would be actionable only because of damages proved to have resulted. By such treatment and hypothesis it would be necessary for Dolenz to go further with his proof and show that he suffered injury thereby proximately caused, as by proof of diminishment in earnings, etc. Dolenz tendered no proof on any such damages; and as applied to damages attempted to be proved there was absefnce of proof of any causal connection. Indeed, it was not shown that any hearer of the words deemed slanderous understood them to be defamatory while there is evidence from one who them that they did not cause him to doubt Dolenz' professional ability or his standing as a physician.

Affirmed.

FRANK A. MASSEY
CHIEF JUSTICE

PANEL A
MASSEY, C.J.: SPURLOCK AND HUGHES, JJ.
PUBLISH
JUL 1 1982

APPENDIX "D"

JUDGMENT

Bernard J. Dolenz, M.D. — From the District Court of Tarrant County

2-81-044-CV — vs. — July 1, 1982 (48-44953-77)

All Saints Episcopal Hospital Opinion by Chief Justice Massey

This cause came on to be heard on the transcipt of the record and the same having been reviewed it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that appellant, Bernard J. Dolenz, M.D., and his surety, American Sentinel Insurance Agency, pay all costs in this behalf expended, for which let execution issue, and that this decision be certified below for observance.

(P)

APPENDIX "E"

COURT OF APPEALS
200 Civil Courts Building
Fort Worth, TX 76102
817/334-1166
Yvonne Palmer, Clerk

September 9, 1982

TO: ALL ATTORNEYS OF RECORD

RE: CA No. 2-81-044-CV
Bernard J. Dolenz, M.D.
vs.
All Saints Episcopal
Hospital

Please take notice that the Court has this date OVERRULED motion for rehearing of appellant in the above styled cause.

Yours very truly,
Yvonne Palmer, Clerk

By
Mary Johns

YP/mj

APPENDIX "F"

THE SUPREME COURT OF TEXAS
P.O. Box 12248 Capitol Station
Austin, Texas 78711

December 31, 1982

Mr. Ragan s. Tate, Attorney
1700 Texas Building
200 West 7th Street
Fort Worth, Texas 76102

Mr. Grant Liser,,Attorney
203 Fort Worth Club Building
Fort Worth, Texas 76102

Dear Sirs:

The application for writ of error in the case of BERNARD J. DOLENZ v. ALL SAINTS EPISCOPAL HOSPITAL, No. C-1639,, was this day refused.

No reversible error.

Very truly yours,

Garson R. Jackson, Clerk

APPENDIX "G"

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 Capitol Station
Austin, Texas 78711

February 9, 1983.

Mr. Ragan S. Tate, Attorney
1700 Texas Building
200 West 7th Street
Fort Worth, Texas 76102

Mr. Grant Liser, Attorney
203 Fort Worth Club Building
Fort Worth, Texas 76102

Dear Sirs:

The motion for rehearing in the case of BERNARD J. DOLENZ v. ALL SAINTS EPISCOPAL HOSPITAL, No. C-1639, was this day overruled.

Very truly yours,

Garson R. Jackson, Clerk

APPENDIX "H"

(Comment: For some strange reason, the Texas Civil Court and the Texas Supreme Court avoided answering issues relating to due process, the hospital bylaws and its contractural relationship with the medical staff, if any.)

82-1902

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BERNARD J. DOLENZ, M.D., *Petitioner*

vs.

ALL SAINTS EPISCOPAL HOSPITAL, *Respondent*

Appendix to Brief in Opposition to Petition for Writ of Certiorari to The Supreme Court of Texas

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BERNARD J. DOLENZ, M.D.	§	IN THE DISTRICT COURT OF
	§	
VS. 77	§	TARRANT COUNTY, TEXAS
	§	
ALL SAINTS EPISCOPAL HOSPITAL	§	48TH JUDICIAL DISTRICT

PARTIAL SUMMARY JUDGMENT

On the 31st day of March, 1978, came on for hearing the Defendant's Motion for Partial Summary Judgment in the above styled and numbered cause. The Plaintiff appeared in person and the Defendant appeared by and through its attorney of record. It appears to the Court that all things have been done in proper form and time and that the Plaintiff had notice of this hearing as required by the Texas Rules of Civil Procedure The Court after considering the Motion for Partial Summary Judgment, the pleadings, the depositions on file and the arguments of counsel, is of the opinion that the Motion should be granted;

It is, therefore, ORDERED, ADJUDGED AND DECREED that the Plaintiff's prayer for injunctive relief to be reinstated upon the medical staff of All Saints Episcopal Hospital be in all things denied and that the said Defendant stand fully and finally released and discharged from all claims by the Plaintiff, Bernard J. Dolenz, that he be re-admitted to the medical staff of the Defendant, All Saints Episocpal Hospital.

SIGNED AND RENDERED this the 2nd day of May, 1978.

William E. Jordan
JUDGE PRESIDING

BOOK 198 PAGE 343

No. 2-81-044-CV

IN THE COURT OF APPEALS FOR THE

SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

BERNARD J. DOLENZ, M.D. APPELLANT

VS.

ALL SAINTS EPISCOPAL HOSPITAL APPELLEE

FROM THE DISTRICT COURT OF TARRANT COUNTY

OPINION

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At the conclusion of Dolenz' case in chief, defendant All Saints moved for instructed verdict or withdrawal of the case from the jury and for rendition of a take nothing judgment. The court granted the motion and rendered such a judgment on August 24, 1981. By recitations of the judgment it was held that the evidence tendered presented no case for slander against All Saints; and, if the evidence did prove slanderous statements chargeable against said defendant, that there was no slander which was slanderous per se; and that there was no proof of damages. The take nothing judgment also recited the fact of the rendition and entry of the earlier partial judgment. Therefrom Dolenz appealed.

We affirm the judgments by the trial court. This we do because we hold Dolenz abandoned his claim for injunctive relief, and because there was no evidence which required submission of any special issue inquiring as to existence of any defamation or any conspiracy to defame plaintiff Dolenz as charged in the amended pleading on which he announced ready for trial.

On Dolenz' abandonment of his claim for injunctive relief the law is correctly stated in McDonald, Texas Civil Practice, Revised, in Chapter VIII, "Supplemental & Amended Pleadings", sec. 8.01.3, "(Definitions and Distinctions) - B. Function of Amended Pleading", and sec. 8.10., "(Amended Pleadings. A. Right to Amend) - E. Status of Superseded Pleadings and of Replies Thereto". In a situation such as presented an amended pleading supplants the instrument amended and that which it amends is no longer proper to be considered part of the trial record. We hold that prior to time of the trial begun August 10th, 1981, by operation of law, Dolenz had abandoned his suit for injunctive relief, permanent as well as temporary, and his cause of action did not then embrace any claim therefor. In Dolenz' appeal from the judgment of August 24, 1981 he could not complain of the adjudication upon his original plea for injunction because his cause of action therefor had been abandoned when he went to trial on his Third Amended Original Petition.

Dolenz' appeal as applied to his charge of conspiracy and slander by All Saints is concluded to be without merit because it did not present any reversible error by the judgment that he take nothing. As a corporation, All Saints could not be guilty save by acts for it through agents. No slander, nor conspiracy to accomplish slander, was proved as applied to any employee or agent - acting within the scope and course of his capacity as agent, or in furtherance of the interests of All Saints as his principal. Neither were any statements Dolenz deemed slanderous as made by All Saint's employees and agents referable to or in discharge of any duty owed to All Saints as principal. Further, even should we attribute the remarks charged to amount to an accomplished slander (by any employee or agent, acting within his capacity as such, with the same heard only by another employee or agent of All Saints acting in like capacity) the remarks proved as made and heard could only have operated to prove that All Saints had conspired with itself. This would not amount to evidence of conspiracy. This was the nature of the evidence upon which Dolenz relies.

Finally, we hold the nature of the remarks charged to be slanderous, even should they be treated as amounting to a slander, would not qualify to be slander per se, or within themselves, so that injury to Dolenz would be presumed to have resulted. By the remarks was no defamation of Dolenz' character by imputation of crime or, as applied to the situation in this case, calculated to affect him injuriously in his medical practice. Continuing in our treatment of the remarks as amounting to slander, they could have amounted to no more than slander per quod, i.e. words communicated to third persons which would be actionable only because of damages proved to have resulted. By such treatment and hypothesis it would be necessary for Dolenz to go further with his proof and show that he suffered injury thereby proximately caused, as by proof of diminishment in his earnings, etc. Dolenz tendered no proof on any such damages; and as applied to damages attempted to be

proved there was absence of proof of any causal connection. Indeed, it was not shown that any hearer of the words deemed slanderous understood them to be defamatory while there is evidence from one who heard them that they did not cause him to doubt Dolenz' professional ability or his standing as a physician.

Affirmed.

FRANK A. MASSEY
CHIEF JUSTICE

PANEL A
MASSEY, C.J.; SPURLOCK AND HUGHES, JJ.
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I N D E X

82-1902

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BERNARD J. DOLENZ, M.D., *Petitioner*

vs.

ALL SAINTS EPISCOPAL HOSPITAL, *Respondent*

Brief in Opposition to Petition for Writ of Certiorari to The Supreme Court of Texas

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QUESTIONS PRESENTED

1. Whether a Petitioner who has failed to follow state procedural rules, and has thus failed to perfect his appeal, presents this Court with a Petition for Writ of Certiorari which may be granted?

2. Whether Fourteenth Amendment concepts of Due Process apply to the recission of a doctor's staff privileges by a private hospital?

RULES OF PROCEDURE

The following state rules of procedure are involved in the resolution of this Petition:

Rule 65. Substituted Instrument Takes Place of Original

Unless the substituted instrument shall be set aside on exceptions, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.

Rule 371. Record on Appeal Defined

The record on appeal shall consist of a transcript and, where necessary to appeal, a statement of facts.

Vernon's Ann. Rules of Civ. Pro.

STATEMENT OF THE CASE

The Plaintiff's First Amended Petition, filed March 14, 1978, requested injunctive relief for the Petitioner to be placed back on the medical staff of the Respondent, and also sought damages for slander. A Temporary Restraining Order was not issued. The Respondent filed its Motion for Summary Judgment regarding the Petitioner's suit to be placed back on its medical staff. The Trial Court on May 2, 1978, entered a Partial Summary Judgment denying the Petitioner's prayer for injunctive relief to be reinstated upon the medical staff and finally releasing and discharging the Respondent from all claims by the Petitioner to be readmitted to that staff. In the Partial Summary Judgment, the Trial Court stated that the

Motion was being granted after considering the Motion for Partial Summary Judgment, the pleadings and the depositions on file (see Appendix A).

Subsequently, the Petitioner amended his pleadings and dropped any claim for injunctive relief or to be readmitted to the staff of the Respondent hospital. This case then went to trial solely on Petitioner's claim for slander against Respondent. At the close of Petitioner's evidence on his claim for slander, the Trial Court granted Respondent's Motion for Instructed Verdict and for rendition of a take nothing judgment. The Trial Court rendered a take nothing judgment in favor of Respondent on August 24, 1981; that take nothing judgment recited the fact of the rendition and entry of the earlier partial summary judgment.

Petitioner then appealed the take nothing judgment awarded against him. As reflected by the Transcript (Appendix C), the record in that appeal did not contain the depositions on file at the time of the granting of the Partial Summary Judgment, nor the Respondent's pleadings on file at the time of the granting of the Partial Summary Judgment, nor the Motion for Partial Summary Judgment, incorporating Affidavits (see Appendix C).

The Texas Court of Civil Appeals at Fort Worth affirmed the partial summary judgment denying Petitioner reinstatement to Respondent's medical staff; in so doing, the Texas Court of Civil Appeals at Fort Worth held that Petitioner had *abandoned* his suit for reinstatement to Respondent's medical staff, because he had gone to trial on amended pleadings which did not contain any

claim for injunctive relief or to be readmitted to Respondent's medical staff (see Appendix B).

The Supreme Court of Texas, without an opinion, affirmed the Court of Appeals Judgment by refusing Petitioner's Application for Writ of Error, with the notation "No Reversible Error."

ARGUMENT

Because the Petitioner has not complied with the proper state procedural rules for taking an appeal, there is no judgment from the highest court of Texas in which a judgment could be rendered; hence, there is no basis for this Court exercising jurisdiction over this case by writ of certiorari. Alternatively, this Court should deny Petitioner's Writ for Certiorari because the Fourteenth Amendment concepts of due process do not apply to private hospitals in rescinding a doctor's staff privileges.

A. Lack of a Judgment from the Highest State Court in Which a Judgment Could Be Rendered, and Independent State Ground for Upholding Decisions Below.

When the Petitioner does not comply with the proper state procedural rules for taking an appeal, the case he brings to this Court "stands as though no appeal had been prosecuted from the judgment rendered by the trial court." *Newman v. Gates*, 27 S.Ct. 220, 223, 204 U.S. 89, 95, 51 L.Ed. 385 (1907), and there exists no judgment from the highest state court in which a judgment could be rendered; thus, there is no basis for this Court to entertain a Petition for Writ of Certiorari. Furthermore, there exists an independent state ground, separate and

apart from any Federal question or issue, which would uphold the judgment rendered below. See *Ellis v. Dixon*, 75 S.Ct. 850, 349, U.S. 458, 99 L.Ed. 1231 (1955), in which the state courts denied leave to appeal on the ground that the pleadings were not a sufficient record to adjudicate the constitutional issues involved.

In the case on which the Petitioner petitions the Court to issue a Writ of Certiorari, the Petitioner has failed to follow the proper procedural rules in two respects: (1) he abandoned his Due Process claims for reinstatement to Respondent's medical staff by going to trial on amended pleadings which did not affirmatively state that claim; and (2) he failed to include in the record sent to the appellate court the Motion for Partial Summary Judgment which the Trial Court granted, and the pleadings, depositions and affidavits which served as the basis for the Trial Court's ruling on that Motion.

1) Abandonment of Claim

After the Trial Court granted the Respondent's Motion for Partial Summary Judgment, the Petitioner amended his pleadings on two occasions. Those amendments did not carry forward or adopt the Petitioner's claim for injunctive relief to be readmitted to the staff of the Respondent hospital.

As the Court of Civil Appeals held in its opinion, the filing of the amended pleading superceded all of the Petitioner's prior pleadings. Vernon's Ann. Rules of Civ. Pro., rule 65; *Gage v. Langford*, 615 S.W.2d 934, 940 (Tex.Civ.App.-Tyler 1981, writ ref., n.r.e.). In *Gage v. Langford, supra*, the plaintiff alleged a cause of action

under the Texas Deceptive Trade Practices Act. The defendant filed special exceptions to that pleading which were sustained by the trial court. Thereafter, the plaintiff filed amended pleadings deleting any mention of a claim under the Texas Deceptive Trade Practices Act. On appeal, the plaintiff claimed that the trial court committed error in sustaining the defendant's special exceptions. The Court of Civil Appeals held that the plaintiff, by filing the amended pleadings, had abandoned any claim under the Texas Deceptive Trade Practices Act and could not complain on appeal of the trial court's rulings on the special exceptions.

In the case at bar, the Petitioner abandoned his claims for injunctive relief to be readmitted to the medical staff of the Respondent hospital by removing any request for such relief from his pleadings.

2) Failure to File Sufficient Transcript

By Summary Judgment, the Trial Court denied the Petitioner's requested injunctive relief to be returned to the Respondent's medical staff.

The Petitioner had the burden, in the appellate courts of Texas, of presenting a record which shows that the Trial Court's Judgment, or the fact findings supporting that Judgment, were erroneous in order to obtain a reversal. *Englander Company v. Kennedy*, 428 S.W.2d 806, 807 (Tex. 1968). That record consists of the Transcript. Vernon's Ann. Rules of Civ. Pro., rule 371. The Trial Court's Partial Summary Judgment stated that it was based upon the pleadings, depositions and Motion for Summary Judgment. That Motion incorporated Affi-

davits. Neither the Respondent's pleadings at the time the Summary Judgment was granted, nor the depositions on file, nor the Motion for Partial Summary Judgment were brought forward by Petitioner to any appellate court (see Transcript Index, Appendix C). Without a proper record, appellate courts could not say that the Trial Court erred in granting the Respondent's Partial Summary Judgment. *Ratcliff v. Bruce*, 423 S.W.2d 614 (Tex.Civ.App.-Houston 1968, writ ref., n.r.e., cert. denied 89 S.Ct. 134, 393 U.S. 848, 21 L.Ed.2d 118, rehearing denied 89 S.Ct. 373, 292 U.S. 956, 21 L.Ed.2d 369); *Kelley v. Kelley*, 575 S.W.2d 612, 615 (Tex.Civ.App.-San Antonio 1978, writ ref., n.r.e.). Where a partial record fails to disclose error, the reviewing court would not presume that the omitted part of the record showed error. *Nagelson v. Fair Park National Bank*, 351 S.W.2d 925, 929 (Tex.Civ.App.-Dallas 1968, writ ref. n.r.e.).

B. Lack of Merit to Petition for Writ of Certiorari

Fourteenth Amendment Concepts of Due Process Do Not Apply to a Private Hospital in Recission of a Doctor's Staff Privileges

In regard to this issue, it has been held that an individual must have been deprived of his rights by "state action" before he will be entitled to equal protection and due process rights as guaranteed by the United States Constitution. In order for this "state action" to exist, it has been held that there must be "a sufficiently close nexus between the State and the . . . [private defendant] so that the actions of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison*

Company, 419 U.S. 345, 351; 95 S.Ct. 449; 42 L.Ed. 477 (1974).

In one case in which a private hospital's rules concerning elective abortions was challenged as violative of the Fourteenth Amendment, it was held that the County which provided financial support to the hospital was not sufficiently connected with the hospital's activities "to imbue those actions [of the hospital] with the attributes of the State." *Greco v. Orange Memorial Hospital*, 513 F.2d 873, 882 (5th Cir. 1975). The hospital in *Greco* received financial support both from the Federal and County Governments, and was required by the County, pursuant to the County's lease of land to the hospital, to admit indigents, to provide yearly financial reports to the County Auditor, and to get County approval before disposing of hospital property. Despite these involvements with Governmental bodies, the *Greco* Court stated "[T]here is no evidence that in acquiring Federal Funds or in leasing the hospital facility the corporation ever accepted a condition relating to the performance or nonperformance of abortions." *Greco, supra*, at 881.

It has been held that a doctor who was permanently discharged without notice or a hearing from the staff of a private non-profit hospital was not the victim of "state action" under the Fourteenth Amendment. *Madry v. Sorel*, 558 F.2d 303, 304 (5th Cir. 1977). The Court reached this holding despite the fact that the hospital was the recipient of publicly raised funds and Federal Hill-Burton funds, because "the receipt of financial assistance, in and of itself, is not a sufficient nexus to make the acts of the hospital equal to the acts of the State." *Madry, supra*, at 305. Other Courts have also held that

the receipt of Hill-Burton Act Funds does not make the private hospital's acts the acts of the State. *Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023 (4th Cir. 1982); *Cardio-Medical Associates v. Crozer-Chester Medical Center*, 50 L.W. 2568 (D.C.Pa. 3/15/82). Additionally, it was held in *Modaber* and *Crozer-Chester* that the receipt by a private hospital of Medicaid and Medicare funds does not make that hospital's actions the actions of the State for the purposes of the Fourteenth Amendment to the United States Constitution.

The only factual grounds which Petitioner asserts as demanding that Due Process should apply to his removal from Respondent's medical staff is that Respondent has received Hill-Burton Funds and Medicare. As was decided in *Madry, supra*, this does not make Respondent's acts the acts of the State, and hence the Fourteenth Amendment Due Process clause does not apply to Petitioner's removal from Respondent's medical staff.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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